

**A Malaysia Land Investment Co (Pte) Ltd v Sathask Realty  
Sdn Bhd & Ors**

HIGH COURT (SIBU) — SUIT NO 22-40 OF 1997  
CLEMENT SKINNER J

**B** 7 NOVEMBER 2000

*Civil Procedure — Striking out — Action — Whether action commenced in the plaintiff's name without the authority of the plaintiff — Whether entering a conditional appearance is prerequisite to an application for striking out — Whether application for striking out constitute an interference with the internal management of the plaintiff*

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*Civil Procedure — Parties — Company — Proper plaintiff — Whether plaintiff company had given the requisite consent to commence the suit*

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The defendants in both the applications sought to invoke the inherent jurisdiction of the court to strike out the plaintiff's suit on the ground that it was improperly commenced in the name of the plaintiff company without the authority of the company and, as such, constitute an abuse of the process of the court. The defendants also sought an order that the manager of the plaintiff company, one Wong Nam Loong ('Mr Wong'), be personally liable to pay the defendants' costs as the defendants contended that he was the person responsible for the bringing of the suit without the authority or sanction of the board of directors of the plaintiff or of its general meeting. Mr Wong also signed a statutory declaration and lodged a police report wherein he stated that he instructed his solicitors to file a suit against the defendants. One of the directors of the plaintiff also averred that Mr Wong had been duly authorized by the board of directors of the plaintiff to commence the suit and that the suit had been brought by Mr Wong with the full approval and knowledge of the plaintiff, without adducing any evidence to support those averments. The applications were filed after the matter was set down for trial. The issues for determination were: (i) whether the defendants should have entered a conditional appearance and applied to strike out the suit; (ii) whether the defendants were estopped from objecting so late in the day and since the defendants had always recognised his position as manager and even served the applications on him; (iii) whether the plaintiff had discharged its burden of proving that Mr Wong was authorized to commence the suit against the defendants; (iv) whether the failure of the defendants to rebut the averments of the plaintiff that Mr Wong had the requisite authority constitute an admission of the same; (v) whether to allow the applications would cause a hurdle to companies intending to commence legal proceedings and open the floodgates for defendants to question proceedings brought against them by incorporated companies; and (vi) whether the bringing of these applications by the defendants constitute an interference with the internal management of the plaintiff.

**Held**, allowing the defendants' applications with costs to be borne personally by Mr Wong:

- (1) A challenge to authority may be taken at any stage of the proceedings, even at the conclusion of the trial, and that the entry of an unconditional appearance by a defendant would not amount to a waiver of irregularity complained of so as to prevent a challenge to authority being mounted at a later stage of the proceedings (see p 459H-I); *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555; *Re LY Swee & Co Ltd*; *Khoo Leong Kee v LY Swee & Co Ltd* [1968] 2 MLJ 104; *Daimler Co Ltd v Continental Tyre & Rubber Co (Great Britain) Ltd* (1916-17) All ER 191 followed.
- (2) Where a challenge to authority in commencing proceedings has been made, the burden of proving that the suit has been instituted with the authority of the company rests on the plaintiff (see p 461D). The plaintiff failed to adduce evidence to show how and when the authorisation was given by the board of directors of the plaintiff and how and when that full approval by the plaintiff was given. Hence, those were merely bare assertions by the plaintiff and the plaintiff had failed to discharge the burden of proving that Mr Wong had the authority to commence the suit (see p 462E-H).
- (3) The averments by Mr Wong in the statutory declaration and the police report that he instructed his solicitors to file the suit were not misstatements but showed that Mr Wong acted on his own accord in instructing solicitors to file the suit and contradicted the averment by the director of the plaintiff (see p 463D-F).
- (4) The failure of the defendants to rebut the averments of the plaintiff that Mr Wong had the requisite authority did not constitute an admission of the same as there had been a joinder of issue because what was averred by the plaintiff was in reply to the defendants' allegation, and the averments by the plaintiff concerned matters solely within its own knowledge and it was the plaintiff to make good that bald assertion by producing evidence in support thereof but none was upheld (see p 463H-I).
- (5) The argument that to allow the applications would cause a hurdle to companies intending to commence legal proceedings could hardly be considered as a good reason for the court not to act if there is sufficient material before the court to show that a company has not authorized litigation. It would not open the floodgates for defendants to question proceedings brought against them by incorporated companies as a company may ratify the bringing of the action when the authority to do the same is challenged and if that were to be the desire of the company, the court would grant a stay of the action for ratification to be obtained. But no stay was sought in this case (see p 464A-E);

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- A *Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd* [1990] 3 MLJ 239 followed.
- B (6) The fact that the defendants pointed to certain articles in the articles of association when challenging whether the plaintiff did in fact authorize Mr Wong to commence the suit in the plaintiff's name did not amount to interfering in the internal management of the plaintiff as it is open to any party who is adversely affected by such action, to question such authority, and the plaintiff should not be permitted to shield behind such a principle to try to get around the evidential burden it was under of showing such authority, but which it had failed to discharge (see p 45C-D);
- C *Sundram Properties Sdn Bhd v Cyril Wettasinghe @ Christie Wettasinghe & Ors* [1987] 1 CLJ 213 followed.
- D (7) The defendants were not estopped although they dealt with Mr Wong and served the applications on him personally as it was necessary to do so since they wished to make him personally responsible for the costs herein (see p 466A-B).

**[Bahasa Malaysia summary]**

- E Defendan-defendan dalam kedua-dua permohonan telah memohon untuk menggunakan bidang kuasa sedia ada mahkamah untuk membatalkan guaman plaintif atas alasan bahawa ia tidak dimulakan dengan betul dalam nama syarikat plaintif tanpa kebenaran syarikat tersebut dan, oleh itu, telah melakukan satu penyalahgunaan proses mahkamah. Defendan-defendan juga memohon satu perintah agar pengurus syarikat plaintif, Wong Nam Loong ('Mr Wong'), sendiri dipertanggungjawabkan untuk membayar kos defenda-defendan kerana defendan-defendan telah menegaskan bahawa beliau adalah orang yang bertanggungjawab memulakan guaman tanpa kebenaran atau sekatan lembaga pengarah plaintif atau mesyuarat umumnya. Mr Wing juga telah menandatangani satu deklarasi statutori dan membuat satu laporan polis di mana beliau telah menyatakan bahawa beliau telah mengarahkan peguam beliau untuk memfailkan satu guaman terhadap defendan-defendan. Salah satu pengarah plaintif juga telah menegaskan bahawa Mr Wong telahpun dibenarkan oleh lembaga pengarah plaintif untuk memulakan guaman tersebut dan bahawa guaman tersebut telah dimulakan oleh Mr Wong dengan persetujuan dan pengetahuan penuh plaintif, tanpa mengemukakan apa-apa keterangan untuk menyokong penegasan-penegasan tersebut. Permohonan-permohonan tersebut telah difailkan setelah perkara tersebut ditetapkan untuk perbicaraan. Isu-isu yang perlu diputuskan adalah: (i) sama ada defendan-defendan patut memasuki satu kehadiran bersyarat dan memohon untuk membatalkan guaman tersebut; (ii) sama ada defendan-defendan diestopkan daripada membantah begitu lewat dan memandangkan defendan-defendan telah sentiasa mengiktiraf kedudukan beliau
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sebagai pengurus dan juga telah menyampaikan permohonan-permohonan tersebut ke atas beliau; (iii) sama ada plaintif telah melepaskan beban membuktikan bahawa Mr Wong telah dibenarkan untuk memulakan guaman terhadap defendan-defendan; (iv) sama ada kegagalan defendan-defendan untuk membangkang penegasan-penegasan plaintif bahawa Mr Wong telah mendapatkan kebenaran telah membentuk satu pengakuan yang sama; (v) sama ada untuk membenarkan permohonan-permohonan tersebut akan menyebabkan satu halangan kepada syarikat-syarikat yang berhasrat untuk memulakan prosiding undang-undang dan membuka laluan kepada defendan-defendan untuk menyoalkan prosiding-prosiding terhadap mereka oleh gabungan syarikat-syarikat tersebut; dan (vi) sama ada dengan memulakan permohonan-permohonan oleh defendan-defendan membentuk campur tangan dengan pentadbiran dalaman plaintif.

**Diputuskan,** membenarkan permohonan-permohonan plaintif dengan kos untuk dibayar sendiri oleh Mr Wong:

- (1) Cabaran terhadap kebenaran boleh diambil pada mana-mana peringkat prosiding, maupun di kesimpulan perbicaraan, dan bahawa kemasukan kehadiran tanpa syarat oleh seorang defendan tidak akan menjadi satu penepian luar aturan yang diadukan sehingga menghalang cabaran terhadap kebenaran tersebut dipindahkan ke peringkat yang lebih lewat (lihat ms 459H-I); *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555; *Re LY Swee & Co Ltd*; *Khoo Leong Kee v LY Swee & Co Ltd* [1968] 2 MLJ 104; *Daimler Co Ltd v Continental Tyre & Rubber Co (Great Britian) Ltd* (1916-17) All ER 191 diikuti.
- (2) Di mana satu cabaran terhadap kebenaran dalam memulakan prodising telah dibuat, beban untuk membuktikan bahawa guaman tersebut telah dimulakan dengan kebenaran syarikat terletak atas plaintif (lihat ms 461D). Plaintif telah gagal untuk mengemukakan keterangan menunjukkan bagaimana dan bila kebenaran tersebut telah diberikan oleh lembaga pengarah plaintif dan bagaimana dan bila kebenaran penuh oleh plaintif telah diberikan. Justeru itu, perkara tersebut hanya merupakan penaksiran sahaja oleh plaintif dan plaintif telah gagal untuk melepaskan beban untuk membuktikan bahawa Mr Wong mempunyai kebenaran untuk memulakan guaman tersebut (lihat ms 462E-H).
- (3) Penegasan-penegasan oleh Mr Wong dalam deklarasi statutori dan laporan polis bahawa beliau telah mengarahkan guaman beliau untuk memfailkan guaman tersebut bukanlah pernyataan yang salah tetapi menunjukkan bahawa Mr Wong telah bertindak atas tindakan beliau sendiri dalam mengarahkan peguam untuk

- A memfailkan guaman dan bertentangan dengan penegasan oleh pengarah plaintif (lihat ms 463D–F).
- B (4) Kegagalan defendan-defendan untuk membangkang penegasan-penegasan plaintif bahawa Mr Wong telah memohon kebenaran tidak membentuk satu pengakuan yang sama di mana terdapat satu penyatuan isu kerana apa yang ditegaskan oleh plaintif adalah berhubung perkara-perkara yang semata-mata dalam pengetahuannya dan adalah plaintif yang perlu membuktikan penegasan yang hanya merupakan fakta sahaja denagn mengemukakan keterangan bagi menyokong yang sama tetapi tiada apa yang telah dikemukakan (lihat ms 463H–I).
- C (5) Hujah bahawa dengan membenarkan permohonan-permohonan tersebut ia akan menimbulkan halangan kepada syarikat-syarikat yang berhasrat untuk memulakan prosiding undang-undang tidak langsung boleh dipertimbangkan sebagai satu sebab yang baik untuk mahkamah tidak bertindak jika terdapat bahan yang mencukupi di hadapan mahkamah untuk menunjukkan bahawa satu syarikat membenarkan litigasi. Ia tidak akan membuka laluan kepada defendan-defendan untuk mempersoalkan prosiding yang dimulakan terhadap mereka oleh gabungan syarikat-syarikat tersebut kerana sebuah syarikat mungkin akan meratifikasikan tindakan yang dimulakan tersebut apabila kebenaran untuk berbuat yang sama sedemikian dicabar dan jika itulah yang dihasratkan oleh syarikat tersebut, mahkamah akan membenarkan satu penggantungan tindakan meratifikasikan tersebut diperolehi. Tetapi tiada penggantungan telah dipohon di dalam kes ini (lihat ms 464A–E); *Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd* [1990] 3 MLJ 239 diikut.
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- F (6) Hakikat bahawa defendan-defendan telah mengutarakan beberapa artikel tertentu di dalam persatuan artikel semasa mencabar sama ada plaintif telahpun membenarkan Mr Wong untuk memulakan guaman atas nama plaintif tidak membentuk satu gangguan terhadap pentadbiran dalaman plaintif kerana ia adalah terbuka kepada mana-mana pihak yang telah mengalami kerugian oleh tindakan sedemikian, untuk mempersoalkan kebenaran tersebut, dan plaintif tidak sepatutnya dibenarkan berlindung di belakang prinsip sedemikian untuk cuba mendapatkan beban keterangan yang terletak atasnya dengan mununjukkan kebenaran tersebut, tetapi yang mana ia telah gagal untuk lepaskan (ms 465C–D); *Sundram Properties Sdn Bhd v Cyril Wettasinghe @ Christie Wettasinghe & Ors* [1987] 1 CLJ 213 diikut.
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- I (7) Defendan-defendan tidak diestopkan walaupun mereka telah berurusan dengan Mr Wong dan telah menyampaikan permohonan-permohonan tersebut ke atas beliau kerana ia adalah perlu berbuat demikian memandangkan mereka berhasrat untuk menjadikan beliau sendiri dipertanggungjawabkan untuk kos dalam kes ini (lihat ms 466A–B).]

**Notes**

For cases on striking out of action, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 4335.

For cases on unconditional appearance, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 982–985.

For cases on company as parties, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3258–3259.

**Cases referred to**

*Cold Storage Singapore (1983) Pte Ltd v Management Corp of Chancery Court* [1992] 1 SLR 521 (refd)

*Daimler Co Ltd v Continental Tyre & Rubber Co (Great Britain) Ltd* [1916-17] All ER 191 (folld)

*Khoo Leong Kee v LY Swee & Co Ltd* [1968] 2 MLJ 104 (folld)

*LY Swee & Co Ltd; Khoo Leong Kee, Re v LY Swee & Co Ltd* [1968] 2 MLJ 104 (folld)

*Ng Hee Thoong & Anor v Public Bank Bhd & Anor* [1995] 1 MLJ 281 (refd)

*Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors* [1991] 1 MLJ 211 (refd)

*Sundram Properties Sdn Bhd v Cyril Wettasinghe @ Christie Wettasinghe & 2 Ors* [1987] 1 CLJ 213 (folld)

*Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd* [1990] 3 MLJ 239 (folld)

*United Investment & Finance Ltd v Tee Chin Yong & Ors* [1967] 1 MLJ 31 (refd)

*William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555 (folld)

*Yukilon Manufacturing Sdn Bhd & Anor v Dato Wong Gek Meng* [1997] 2 MLJ 212 (refd)

*Sarbjit Singh Khaira (Khaira & Co)* for the plaintiff.

*Stephen Lu (Huang & Co)* for the first and third defendants.

*George Lim (Battenberg & Talma Advocates)* for the second defendant.

**Clement Skinner J.:** There are two applications before me. The first is filed by the first and third defendants and the second by the second defendant. Both applications seek the same orders and rely upon the same grounds. At the request of counsel, both applications were heard together. By these applications, the defendants seek to invoke the inherent jurisdiction of the court to strike out this suit on the ground that it was improperly commenced in the name of the plaintiff company without the authority of the company and, as such, constitutes an abuse of the process of the court. The defendants also seek an order that a person named in the application as Wong Nam Loong, the manager of the plaintiff company, be personally liable to pay the defendants' costs as they say he is the person responsible for the bringing of this suit without the authority or sanction of the board of directors of the plaintiff or of its general meeting.

- A** First, the facts giving rise to these applications. The matters complained about in this suit go back some 30 years ago, but this suit itself was only commenced on 11 September 1997. In it, the plaintiff, a company duly incorporated with limited liability, claims that two parcels of land ('the said lands') which were transferred to the first defendant in 1965 were held in trust for it by the first defendant, but that in breach thereof, the first defendant transferred the said lands to the second defendant in 1991. The third defendant, a director of the first defendant, is being sued for the part he allegedly played in the transfer of the said lands to the second defendant. The defendants have all appeared and filed defences in this action. They deny that the first defendant held the said lands in trust for the plaintiff as alleged or that there has been any fraud involved in the transfer of the said lands to the second defendant.

- C**
- D** The trial of this action was fixed to commence on 22 February 2000, but did not proceed as the solicitors then on record for the plaintiff applied for an adjournment on the grounds that the plaintiff's witnesses had migrated to Australia, England, Hongkong and Taiwan. The court accordingly granted a final adjournment and fixed the trial for 3 to 5 May 2000 with costs to the defendants. However, before the new hearing date, the solicitors then on record for the plaintiff applied to discharge themselves and gave as a reason the plaintiff's continuous, wilful and deliberate failure to give instructions despite numerous letters to the plaintiff. On 2 May 2000, the court duly discharged the plaintiff's former solicitors from further acting for them.

- E**
- F** On the new date fixed for the trial of this suit, that is, 3 May 2000, an advocate appeared on behalf of the plaintiff to request for an adjournment on the ground that Mr Wong Nam Loong (the manager of the plaintiff company) was taken ill and produced a medical certificate as evidence of such fact. Apparently, the court was not satisfied with the certificate produced but, nevertheless, felt compelled to grant an adjournment and so fixed this case for trial on 19 October 2000 with an order that if the plaintiff did not proceed on that day, this suit would be struck out. The court also ordered costs to be paid to the defendants.

- G** Alerted by the fact that the plaintiff's former solicitors could not get instructions, the defendants' solicitors wrote on 27 May 2000 to the advocate who had appeared on behalf of the plaintiff on 3 May 2000 to enquire from him whether he had filed a notice of change of advocates and whether he had authority to act for the plaintiff company, and if so, to make available to the defendants a copy of such authority. On 5 June 2000 that advocate replied that he had no instructions to act any further for the plaintiff. Having received such a reply, the defendants' solicitors on 21 June 2000 wrote to the plaintiff asking 'on whose authority the company sanctioned the commencement of this action, and when such sanction was given and whether such sanction was given by the board of director's resolution or by the general meeting.'

- H**
- I** The defendants' solicitors received no reply to their challenge to the plaintiff to show that it had authorized the bringing of these proceedings.

The defendants also found support for their belief that the bringing of this action had not been authorized by the company from a reading of certain documents signed by Mr Wong Nam Loong in which he claimed to have the authority and sanction of the plaintiff company in taking certain actions on behalf of the plaintiff company in respect of the said lands. Those documents were a statutory declaration dated 14 November 1996 (the 'statutory declaration') sworn in support of a caveat lodged against the said lands and a police report lodged against the third defendant on 25 March 1998.

The defendants accordingly said that this suit was commenced on the instructions of Wong Nam Loong, when in actual fact he did not hold any authority from the plaintiff company to do so, nor has the plaintiff company authorized the bringing of this action. Hence these applications.

The plaintiff opposes these applications on several grounds which I now consider in turn.

It was submitted by counsel for the plaintiff that if the defendants had wished to take this point, they should have entered a conditional appearance, then applied to strike the suit out instead of proceeding this far without objecting. In not having done so, the defendants are now estopped from doing so, especially when the hearing of this suit is fixed for 19 October 2000. I regret that the authorities are against the plaintiff on this point as they show that a challenge to authority may be taken at any stage of the proceedings, even at the conclusion of the trial. In *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555, the then Supreme Court had occasion to consider arguments, inter alia, on the procedure to be adopted when a challenge to the authority of a solicitor is taken, and on what evidence the court should act on when such challenge is made. In the course of so doing, this is what Gunn Chit Tuan SCJ said about the time at which that challenge can be taken. At p 558, para F-H his Lordship said:

Although the various dicta in the authorities as to the methods open to a defendant to contest the authority to bring an action are not altogether easy to reconcile or understand, we would agree that a challenge to the authority of solicitors may be made at any time and the court in its inherent jurisdiction may entertain the challenge made orally and may order the action to be struck off if there was sufficient or admitted evidence that there is no action properly before it. But when there is no such evidence, the court should only stay the proceedings and determine the issue of want of authority on the application of a party by motion or summons.

In *Re LY Swee & Co Ltd; Khoo Leong Kee v LY Swee & Co Ltd* [1968] 2 MLJ 104, Raja Azlan Shah J (as His Highness then was) in considering a submission that failure to promptly challenge the authority of counsel to act for a company will lead to waiver and estoppel from raising the point, held that an application to question the lack of authority may be made at any stage in the proceedings, even at the conclusion of the trial. This is what his Lordship said at p 107, para F-H of that case:

- A The other argument proffered by Mr Talalla was the question of waiver. On the strength of *Russian Commercial & Industrial Bank v Comptoir de Mulhouse* [1925] AC 112, he submitted that an application to question the authority of counsel to act for the company should have been made promptly to avoid the answer that it was ratified. Since the applicant had failed to do that it was said that she had waived her right and thus estopped from raising this point. The
- B short answer to that is, as it seems to me, that there was no waiver. The application to question the lack of authority may be made at any stage in the proceedings, even at the conclusion of the trial (see *Simmons v Liberal Opinion Ltd* [1911] 1 KB 966).

- C In *Daimler Co Ltd v Continental Tyre & Rubber Co (Great Britain) Ltd* [1916-17] All ER 191, the respondent company was incorporated in England, but all its shareholders, except one, and all its directors were German residents in Germany. When war broke out between England and Germany, it commenced an action for payment of a trade debt. The solicitors of the respondent company issued the writ upon the instructions of the secretary of the company. On an application for summary judgment, the appellants
- D contended that the company was an alien enemy company and payment of the debt would amount to trading with the enemy. It was also contended that the action had been commenced without the authority of the company. The master gave leave to sign final judgment, and his decision was affirmed by the judge in chambers and the Court of Appeal. On appeal to the House of Lords, it was held, inter alia, that the action had been commenced
- E without authority of the company and ought to be struck out. In the course of his opinion, Lord Parker of Waddington, having decided that the contention that the secretary of the company could authorize the institution of the action was untenable, went on to say at p 203 C-D:

- F It follows that this action was instituted without authority from the company, and, in my opinion, the court, having notice of the fact, should have refused relief. It is true that a question whether the plaintiff's solicitor has or has not been validly retained is in general brought before the court by motion to which the solicitor is made a party. But when the court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed.

- G It has not escaped my attention that in the above cases, the court was there dealing with a challenge to a solicitor's authority to act for a company. In my view, what was stated in those cases will apply with equal force where it is the authority of the manager to institute proceedings in the name of a company which is being challenged, since what is complained about in both
- H instances is the authority to do so.

- I With regard to the submission of counsel for the plaintiff that the defendants should have entered a conditional appearance if they wished to make this challenge, the authorities I have cited above show that a challenge to authority may be made at any stage of the proceedings, and that the entry of an unconditional appearance by a defendant would not amount to a waiver of the irregularity complained of so as to prevent a challenge to authority being mounted at a later stage of the proceedings.

It was next submitted on behalf of the plaintiff, that this action had in fact been commenced with the authority of the plaintiff company. In support of this submission, the following assertions made in the affidavit of Lo Kok Kee, a director of the plaintiff company, affirmed on 16 August 2000 were relied on:

(a) Paragraph 6 thereof which states:

'I refer to para 5 of Ng's affidavit and state that Mr Wong Nam Loong, as a manager of the plaintiff company, has been duly authorized by the board of directors of the plaintiff company to act on behalf of the plaintiff company in respect of all matters related to the said two properties, namely Lot 960, Sibuland District and Occupation Ticket No 27336, including the matters as stipulated in para 5 of Ng's affidavit. This fact is expressly stated in each of the documents mentioned in para 5 of Ng's affidavit.'

(Paragraph 5 of Ng's affidavit being answered to states that Wong Nam Loong claimed to have the authority and sanction of the plaintiff company to make the statutory declaration, lodge a police report and to commence this suit).

(b) Paragraph 7 thereof which states:

'I refer to para 6 of Ng's affidavit, and state that the allegations stated therein are misconceived and baseless and in so far as the plaintiff company is concerned, all matters in respect of the said properties and the present suit before this honourable Court is conducted by Mr Wong for the plaintiff company with the full approval of the plaintiff company and within its knowledge. I state that a board resolution or a resolution of the annual general meeting of the company is not required for such purposes.'

(Paragraph 6 of Ng's affidavit being answered to states that Wong Nam Loong did not have any authority by way of a board of directors' resolution or resolution of the annual general meeting of the company to make the statutory declaration, police report and commence this suit).

Relying on the above assertions, counsel for the plaintiff submitted that no evidence to the contrary had been adduced by the defendants to rebut these averments and relying on the principles governing the evaluation of affidavit evidence as enunciated in the case of *Ng Hee Thoong & Anor v Public Bank Bhd & Anor* [1995] 1 MLJ 281, namely, that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission of the fact so asserted. It was submitted that there is no reason to disbelieve that the present suit had been improperly commenced and that the defendants' concern that this action had been commenced by Wong Nam Loong without the plaintiff's approval had been sufficiently dispelled by the confirmation given by Lo Kok Kee on behalf of the board of directors of the plaintiff company.

Counsel for the plaintiff went on to further submit that to insist that the plaintiff company proves that this suit was commenced with its authority, and that a resolution has been passed in due compliance with the provisions of the articles of the plaintiff company, and all procedures relating thereto would create a hurdle for incorporated companies intending to commence legal proceedings to protect its interest, and any decision to that effect

- A would surely open the floodgates for parties being sued by incorporated companies to question the proceedings on this ground. In support of the above contention, counsel cited the following passage from *Company Law* by Walter Woon, 2nd Ed at pp 319–320.

- B In practice, the board of directors do not invariably meet to authorize proceedings in the name of the company. If the litigation is routine and uncontroversial, normally it will fall to management to instruct solicitors to commence an action.

- C .....It would be ludicrous if the law required the board or general meeting of a company to meet and specifically authorize the managing director to commence litigation to recover, say, a S\$10,000 debt, or to defend a suit brought against a company ..... To hold that a resolution is necessary would mean, firstly, that the action could be struck out as unauthorized and, secondly, that the solicitor would be liable for the other party's costs, having commenced a suit without proper authority. This, it is suggested, is an appalling conclusion.

- D ..... Authority to maintain proceedings in the company's name does not have to be obtained by resolution; it is sufficient if all the members know and approve of the action.

- E Before considering the merits of the plaintiff's contentions, a point needs to be made, it is this: where a challenge to authority in commencing proceedings has been made, the burden of proving that the suit has been instituted with the authority of the company, rests on the plaintiff. (See *Daimler's* case, per Lord Atkinson at p 198 A, *United Investment & Finance Ltd v Tee Chin Yong & Ors* [1967] 1 MLJ 31 at p 35 G–H, and *Yukilon Manufacturing Sdn Bhd & Anor v Dato Wong Gek Meng* [1997] 2 MLJ 212 at p 220 E).

- F Bearing in mind that it is an evidential burden which the plaintiff has to discharge, the plaintiff contented itself with discharging that burden by relying on the two averments contained in paras 6 and 7 of Lo Kok Kee's affidavit set out above. The question is, has the plaintiff succeeded in discharging that burden? In my view, that question is best answered by taking a closer look at what paras 6 and 7 of Lo Kok Kee's affidavit say.

- G In essence, para 6 asserts that Wong Nam Loong had been duly authorized by the board of directions of the plaintiff company to commence this suit. Since the plaintiff relies upon authorization by the board, reference must be made to the articles of association of the plaintiff to see what is said about the powers of the directors and how such powers are exercised and then viewing the assertion in para 6 against them.

- H In so far as the articles of association are concerned, the following are relevant:

- I Article 70 which provides that 'the business of the company shall be managed by the directors in such manner as they think fit, and they may exercise 'all such powers of the company and do on behalf of the company all such acts as may be done by the company  
Article 74 which allows the directors to delegate their powers to the managing director or to committees consisting of such in members of their body as they think fit.

Article 89 which provides that for the despatch the business of the company, the number of directors necessary for a quorum is three, unless otherwise determined.

The above articles show that the powers to manage the business of the company are conferred on the directors, and that that power is conferred on the directors collectively as a board. It is to be noted next that the directors may delegate the powers vested in them to the managing director or to committees of their body. Although the above articles do not talk about the institution of legal proceedings, it is, I think, accepted that the authority to institute legal proceedings on a company's behalf is vested in the board of directors as an incident of managing the business of the company. See *Gower's Modern Company Law* 3rd Ed p 583 where it is stated:

And the appropriate agency to start an action on the company's behalf is the board of directors, to whom the power is delegated as an incident of managing the company.

See also the case of *United Investment & Finance Ltd v Tee Chin Yong & Ors* [1967] 1 MLJ 31 where Chua J, after having examined the articles of association of the plaintiff company in that case which contained similar provisions to the articles in our present case, held that as regards litigation by the company, the directors are the persons who have authority to act for the company.

Now, since it is the assertion of Lo Kok Kee that it was the board of directors that had duly authorized Wong Nam Loong to institute this suit, and since by the articles of association of the company that power is vested in the directors collectively unless expressly delegated, I would have expected that in the face of the very clear challenge to the company that it had not so authorized Wong Nam Loong, and in an effort to discharge the evidential burden on the company, Lo Kok Kee would have provided some form of evidence to show how and when that authorization was given by the board. None was. The same may be said about the assertion in para 7 of Lo Kok Kee's affidavit. Since it is asserted that this suit had been brought by Wong Nam Loong with the 'full approval of the plaintiff company and within its knowledge', I would have expected Lo Kok Kee to say how and when that full approval by the company was given. None was. Since it is the stand of the plaintiff that a board resolution or a resolution of the annual general meeting of the company was not required for the purpose of authorizing Wong Nam Loong to institute this action, how then was the alleged authorization of the board and full approval of the company given? In the absence of any evidence to support the assertions in paras 6 and 7 of Lo Kok Kee's affidavit, I must regard them as bare assertions. These bare assertions must also be looked at against the averments in para 25 of Wong Nam Loong's statutory declaration and police report, where he states twice that it was 'I' who instructed 'my solicitors' to file this action. Paragraph 25 of the statutory declaration reads as follows:

I have instructed my solicitors to file an action against, inter alia, Sathask, Choong and Excel Gains for damages for fraud and breach of trust, seeking the remedy of, inter alia, damages and for the transfer of the lands to MLI. I

- A also verily believe that MLI has a right to caveat the lands in view of the fact averred to above.

And when the police report is looked at, the first paragraph thereof states:

- B I am directed by the board of directors of Malaysia Land Investment Co (Pte) Ltd ('MLI') whose business address is at No 11-2, Jalan Telawi Dua, Bangsar Baru, 59100 Kuala Lumpur to make this report against one Choong Kok Min @ Choong Yuet Hwa of No 45, Jalan Sultan Ismail, 50250 Kuala Lumpur ('Choong'). Sometime towards end of 1996, whilst I was instructing my solicitor on certain legal matters leading to the filing of a writ of summons in the High Court Sabah and Sarawak (Sibu) Suit No 20-22-40 of 1997, I came across a statutory declaration made by aforesaid Choong on 9 October 1989.....

- C It would have been a simple matter for Wong Nam Loong to say that he had, on behalf of the company, instructed the company's solicitors, but the fact that he states twice that he was instructing his own solicitors shows that what was said is not a misstatement. If anything, these statements by Wong
- D Nam Loong show that he acted on his own accord in instructing solicitors to file this action and effectively, in my view, contradicts the averment by Lo Kok Kee that he (Wong Nam Loong) was acting with authority in commencing this action. Even when the statutory declaration and police report of Wong Nam Loong are read as a whole, there is nothing in them to suggest that he had been authorized by the board or the company to
- E institute this suit. Wong Nam Loong does, of course, say that he was authorized to affirm the statutory declaration on behalf of the plaintiff and that the board had directed him to lodge the police report, but, it is one thing to say that one is authorized to affirm a statutory declaration and
- F police report which narrates certain events and facts, and quite another thing to say that the statutory declaration and police report expressly state that one is duly authorized to institute these proceedings which, when examined, these documents do nothing of that sort.

For the reasons above, I find that the plaintiff has failed to discharge the burden on it of showing that it had authorized the institution of this suit.

- G With reference to the plaintiff's attempt to discharge its evidential burden by the use of the principle governing the evaluation of affidavit evidence as stated in the case of *Ng Hee Thoong & Anor v Public Bank Berhad*, I regret to say the principle is of no avail to the plaintiff in this case as firstly, it was the defendants who had by their affidavit made the allegation of lack of authority and what was said by Lo Kok Kee was said in
- H reply to the defendants' allegation; there had, accordingly, been a joinder of issues on the question of authority and therefore this was not a case in which a positive assertion on a matter in issue had gone unchallenged; and secondly, the assertion made by the plaintiff regarding the authority it had allegedly given Wong Nam Loong concerned matters solely within its own knowledge and it was for the plaintiff to make good that bald assertion by
- I producing evidence in support thereof, but none was. The failure or omission of the defendants to refute or contradict the assertion does not in the circumstances give rise to any inference that the defendants admitted

the truth of the assertion. Nor does it follow that the court ought to accept the assertion. (See *Cold Storage Singapore (1983) Pte Ltd v Management Corp of Chancery Court* [1992] 1 SLR 521).

I will deal next with the submission of counsel for the plaintiff, that to allow this application would cause a hurdle to companies intending to commence legal proceedings and open the floodgates for defendants to question proceedings brought against them by incorporated companies. In answer to this submission, I would say that that argument can hardly be considered as a good reason for the court not to act if there is sufficient material before the court to show that a company has not authorized litigation. I would also point to the several authorities cited above which show that notwithstanding that it may pose a hurdle, once it has been demonstrated that an action has been commenced in the name of a company without its authority, the court will not turn a blind eye to it but will act on it. With regard to the floodgates argument, I would say that the cases also show that if an action has, in fact, been commenced without the authority of the company, then, on being challenged, all is not lost because a company may ratify the bringing of the action, and if that were to be the desire of the company, the court would grant a stay of the action for ratification to be obtained. (See *Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd* [1990] 3 MLJ 239). But that is not the position in this case where the plaintiff has not sought any stay. It is the plaintiff's position that this action was commenced with its authority but, unfortunately, I have not found that to be so.

I also wish to say that I did not find what had been stated by the learned author Walter Woon in his publication, *Company Law*, which was quoted to me by counsel for the plaintiff helpful to the plaintiff's case. In the first place, in that passage quoted, the learned author states that authority need not be obtained by resolution, it is sufficient if all the members know and approve. What the learned author was there saying is that approval for instituting litigation may be manifested in a variety of ways and not necessarily by way of a resolution. The learned author there was discussing a principle; he was not concerned with the evidence by which such approval was to be established. In our case, since it is asserted that there was such approval, we are concerned with the evidence of it to discharge the burden on the company of showing such approval. Secondly, this suit which involves a claim for landed property and which also alleges fraud can hardly be described as routine litigation. Thirdly, it is with a view to avoiding the necessity of a board having to meet to sanction all litigation that the articles of a company allow for proper delegation. But in our case, delegation in accordance with the articles was never raised.

It was next argued on behalf of the plaintiff that the court has no jurisdiction to interfere with the internal management of a company and the question whether or not the memorandum and articles of association of the company had been complied with is, in any event, a matter which strangers such as the defendants had no right to question. Counsel for the plaintiff further submitted that what the defendants are here trying to do is to enforce the provisions of the articles of association of the plaintiff company

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- A by stipulating that the plaintiff can only maintain this action if its articles have been complied with, but counsel submits, the defendants being outsiders have no right to insist on compliance with the articles which is an internal matter for the company and its members only. In support of its contention, counsel for the plaintiff quoted the following passage found in Halsbury's Laws of England, Vol 7, para 955 which reads:

- B The Court has no jurisdiction to interfere with the internal management of a company acting within its powers.

- I regret I cannot agree with this submission: it does not accurately describe what the defendants are doing by this application. The defendants do not question the power of the company to bring the suit. What the defendants question is whether this suit having been commenced in the company's name by the manager Wong Nam Loong, did the company, in fact, authorize it? In making such challenge, the defendants have pointed to certain articles, relevant to the question of authority to bring legal proceedings, as evidence of the fact that no such authority could have been given. Such reference to the articles cannot, in my view, amount to interfering in the internal management of the plaintiff as alleged and neither, in my view, should the plaintiff be permitted to shield behind such a principle to try to get around the evidential burden it is under of showing such authority, but which, as I have earlier found, it has failed to discharge.

- E In *Sundram Properties Sdn Bhd v Cyril Wettasinghe @ Christie Wettasinghe & 2 Ors* [1987] 1 CLJ 213, a case concerning the use of a company's name in legal proceedings by persons not registered as shareholders of the company, Peh See Chin J (as he then was) had to deal with the question of whether only shareholders and directors of a company could challenge the authority for using the company's name in an action or outsiders could do so as well. The learned Judge held that it was open to any party who is adversely affected by such action, to question such authority, irrespective of whether he is a shareholder, or a director or not at all. I respectfully concur with that reasoning.

- G For completeness, I wish to address several other contentions raised by counsel for both parties in the course of arguments. In the affidavits filed on behalf of the defendants in support of their applications, they had alluded to certain facts in support of their contention that Wong Nam Loong had not been authorized by the plaintiff to commence this action. Those facts were that the plaintiff company had ceased business operations in Malaysia since 1995; that the sole shareholder in the plaintiff company, namely, Wideview Investments Holdings (Pte) Ltd, had since 20 May 1998 been struck off from the register of companies in Singapore; that the plaintiff does not occupy its registered address in Kuala Lumpur. I regret that I did not find any merit in these assertions because, even if they are correct, it does not necessarily follow that Wong Nam Loong had not been authorized as alleged because he could have been authorized before the events mentioned. But, what I have just said would not affect the outcome of these applications for the reasons already set out earlier.

I also did not find any merit in another submission made by the plaintiff in resisting these applications. It had been said that the defendants are estopped from denying Wong Nam Loong's authority to act for the plaintiff as the defendants had always recognised his position as manager, and even served the applications on him. In the first place, I do not see how by dealing with Wong Nam Loong, the equitable doctrine of estoppel would operate to prevent a challenge being made to the plaintiff to show that it did authorize him to bring this suit. Secondly, the defendants served the applications on him personally as well as the plaintiff company. The defendants did so for good reason — they wished to make him personally responsible for the costs herein, and, had named him in the application as a person to be served with the application — a procedure which the authorities show, is necessary where a person is to be made responsible for costs. (See *United Investment & Finance Ltd v Tee Chin Yong & Ors* ).

In the circumstances, I am satisfied that this action was commenced in the name of the plaintiff company without the proper authority and must accordingly be struck out. There remains the question of costs. On the evidence before me, I am satisfied that it was Wong Nam Loong who acted to bring these proceedings. When challenged as to his authority, he has remained inexplicably silent. The summons in chambers specifically seek an order that he personally bears the costs; it was also addressed to him and it was served on him personally. Since the company is not properly before the court, and it was Wong Nam Loong who is the person responsible for bringing these proceedings, following the decision in *Re LY Swee & Co Ltd*, *Khoo Leong Kee v LY Swee & Co Ltd*, and *Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors* [1991] 1 MLJ 211, I order that Wong Nam Loong must personally bear the costs of the defendants in this action as well as this application.

*Defendants' applications allowed with costs.*

Reported by Moy Saw Han

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